Central Steel Erecting Co., Inc. *and* International Union of Operating Engineers, Local 106, AFL–CIO. Case 3–CA–17553

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On September 13, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

This case involves interpretation of a provision of the collective-bargaining agreement between the Union and the Respondent. Specifically, the issue presented is whether the Respondent paid the correct amount of wages to two individuals for work performed by them on certain dates at one of the Respondent's construction sites.[1]

Thomas Springer, a crane operator, and William Costello, a member of the crane crew,[2] were sent home early on six occasions from the Respondent's construction site for reasons other than bad weather. The Respondent paid Springer and Costello 4 hours of pay for each of those days. The judge found that, under section 2(d) of article III of the collective-bargaining agreement, Springer and Costello were entitled to a full day's pay for each of those days. The Respondent excepts to the judge's decision, arguing that the introductory clause to section 2 limits application of section 2(d) to Saturdays and Sundays and that Springer and Costello were sent home early on weekdays.

Article III of the agreement between the Union and the Respondent reads as follows:

ARTICLE III
REPORT & SHOW-UP TIME

Section 1. Engineers, firemen and oilers working on broken time will receive two (2) hours' pay for reporting on the job, unless ordered not to on the previous day before 4:30 p.m. If they start to work in the morning, they shall receive four (4) hours' pay. For continuing beyond the fourth hour, they shall receive a full day's pay, regardless of hours worked.

Section 2. If an engineer, fireman or oiler is ordered out on a Saturday or Sunday, he shall be paid as follows:

a. for reporting, but not starting work, he shall receive two (2) hours' pay at the overtime rate.

b. for starting work, they shall receive four (4) hours' pay at the overtime rate.

c. for continuing beyond the fourth hour they will receive a full day's pay at the overtime rate.

d. Crane operator and/or crew guarantee of eight (8) hours at appropriate rate when they report for work each day, weather permitting work. Otherwise, 2-4-8 provision applies.

We first note that the Respondent did not make the argument it now relies on to the judge during the hearing and that the parties waived the opportunity to file briefs with the judge. Instead, at the hearing, the Respondent focused its questioning and statements on the weather conditions of the days in question, on Springer's and Costello's timecards, and on the timeliness with which Springer and Costello complained to the Respondent that they were underpaid. Because this is the first time that the Respondent has argued that the introductory clause to section 2 limits the full-day pay guarantee of subparagraph 2(d) to Saturdays and Sundays, the judge's decision does not address this argument.

Assuming arguendo that the Respondent's argument is timely, we find no merit in the Respondent's exception. A reading of the entire agreement, and article III in particular, indicates that the clear intent of the parties was to treat the wages of crane operators and crews in a manner different from that accorded the wages of the engineers, firemen and oilers. The introductory clause of section 2 specifically refers to ''engineers, firemen and oilers'' ordered out on Saturdays and Sundays; therefore, the introductory clause cannot limit subparagraph 2(d) which applies to ''crane operators and/or crews.''

In addition, when article III is read in its entirety, it is apparent that section 1 addresses regular pay for engineers, firemen and oilers, while the introductory clause of section 2 and subparagraphs 2(a), (b), and (c) address overtime pay for engineers, firemen and oilers working on Saturdays or Sundays. On the other hand, subparagraph 2(d) references an ''appropriate'' rate to be paid to crane operators and crew—which we interpret to mean the regular pay rate, paid for weekdays, or the overtime pay rate, paid on weekends.

Finally, we note that appendix I to the agreement indicates that section 2(d) was an addition to article III, suggesting that section 2(d) was simply misplaced—it more likely should have been added as section 3. This interpretation of article III, providing a guarantee of a

[1] The agreement excluded alleged violations concerning wages from its arbitration provision.

[2] Although the judge described Costello as an oiler, the facts show that Costello was assigned to work with the crane operator as a member of the crane crew and the Respondent does not contend otherwise.

full day's pay to crane operators and crew, is consistent with the fact that, under the agreement, crane operators and crews receive higher pay than the engineers, firemen and oilers. Any other reading of article III, including the Respondent's suggested reading, makes little sense. For these reasons, in addition to those stated by the judge, we affirm the judge's decision and adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Central Steel Erecting Co., Inc., Chadwicks, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Alfred M. Norek, Esq., for the General Counsel.
James M. Kernan, Esq., for the Respondent.
Daniel McGraw, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Utica, New York, on August 9, 1993. The complaint herein, which issued on February 12, 1993, was based on an unfair labor practice charge and an amended charge filed on December 29, 1992,[1] and February 19, 1993, by International Union of Operating Engineers, Local 106, AFL–CIO (the Union). The complaint alleges that Central Steel Erecting Co., Inc. (Respondent), a party to a contract with the Union covering, inter alia, its operating engineers, failed to continue in full force and effect all the terms of this agreement by failing to abide by article III of the agreement which provides for a guarantee of 8 hours' pay, weather permitting, for crane operators and the crews. It is further alleged that this is a mandatory subject of bargaining and the change was made without the Union's consent, in violation of Section 8(a)(1) and (5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office in Chadwicks, New York, is a contractor in the building and construction industry. During the 12-month period ending December 31, Respondent purchased and received at its Chadwicks facility and at New York State jobsites goods valued in excess of $50,000 directly from points located outside of the State of New York. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1992.

III. FACTS AND ANALYSIS

The facts herein relate solely to the work Respondent performed on the Fulton County Jail jobsite in Johnstown, New York (the jobsite), where it was engaged as a rigging, steel erecting, and millwork contractor. Prior to commencing work at the jobsite, Respondent entered into a contract with the Union wherein it granted recognition to the Union as the collective-bargaining representative of its operating engineers, firemen, oilers, crane operators, and/or crew employed by Respondent at the jobsite.[2] The sole issue herein relates to whether Respondent failed to abide by the terms of article III of the agreement, which states:

REPORT AND SHOW UP TIME

> Section 2(d). Crane operators and/or crew guarantee of eight (8) hours at appropriate rate when they report for work each day, weather permitting work. Otherwise 2-4-8 provision applies.

Article III, section 1 of the contract refers to this ''2-4-8 provision'' and states:

> Engineers, firemen and oilers working on broken time will receive (2) two hours' pay for reporting on the job, unless ordered not to on the previous day before 4:30 p.m. If they start to work in the morning, they shall receive four (4) hours' pay. For continuing beyond the fourth hour, they shall receive a full day's pay, regardless of hours' worked.

It is alleged that Thomas Springer and William Costello, Respondent's employees at the jobsite, were not paid for the full 8 hours for the following days that they reported to the jobsite and worked: October 29, November 6, 11, and 24, and December 17 and 23, and it is alleged that this failure to abide by the terms of article III, section 2(d) of the contract violates Section 8(a)(1) and (5) of the Act.

The witnesses herein were Gene Messercola, president and business manager for the Union, Springer and Costello, and Debra Acee, Respondent's bookkeeper. Springer and Costello were Respondent's sole unit members employed at the jobsite. Costello was a member of the Union; Springer, whom Respondent requested to work at the jobsite, was a member of a sister local of the Union. Springer operated the large truck crane at the jobsite; Costello was the oiler at the site, erecting and maintaining the crane and giving Springer hand signals to assist in the operation of the crane. As stated, the job involved the construction of a county jail. Respondent's contract (and Springer and Costello's job during this period) was, principally, using the crane to unload concrete planks, as well as steel beams, off tractor-trailers and setting them in place as the floor or ceiling of the building.

Springer and Costello began working at the jobsite in mid-October, and remained working there until January 1993. Respondent had timecards which were given to Springer and Costello to fill out by hand. From the time they first worked at the jobsite through November 24, they recorded the actual hours that they worked at the jobsite. For all but 4 days dur-

[2] Art. XVI, sec. 2 of the agreement states that violations concerning wages are not subject to the arbitration provisions of the agreement.

ing this period, they worked 8 hours and were paid accordingly. However, during this period there were 4 days (October 29 and November 6, 11, and 24) when there was not enough work for them to do so that Respondent's foreman on the job told them to go home after they had worked for 4 hours. This was usually caused by the lack of trucks delivering the concrete slabs or the steel beams that they moved with their crane. Springer and Costello each testified that on none of the six occasions that they were sent home prior to the completion of their 8 hours at the jobsite was the weather a contributing factor in the lack of work. On these 4 days Springer and Costello each worked 4 hours before being sent home by Respondent and they put down 4 hours on the timecards that they filled out for Respondent.

On November 24, Messercola visited the jobsite and spoke to Springer and Costello. They told Messercola about receiving only 4 hours' pay for certain days, and Messercola showed them article III of the agreement which guarantees them 8 hours' pay, weather permitting. After meeting with Messercola, Springer told Respondent's foreman at the jobsite of the 8-hour guarantee. Subsequent to that, and specifically for the two remaining days that they worked less than 8 hours, December 17 and 23, Springer and Costello put down 8 hours on their timecards. On these two dates they worked 4 hours and wrote 8 hours on their timecards because they had learned of article III of the agreement. Sometime after they handed in these timecards, the number of hours for these days was changed to 4, and they were paid for 4 hours on each of these days.

Messercola testified that on about November 24, after Springer and Costello told him that they had not been paid for 8 hours as they should have been on certain days, he called Acee. He told her that Springer and Costello were not being paid the correct number of hours under article III of the contract. She said that she was busy, that she would not pay it, and did not want to be bothered with it at that time. Messercola told her to look at the contract and get back to him. Not having heard from her, he called her again on about December 17. He told her that Springer and Costello were still not receiving their proper pay as provided for in article III. Acee told him that the men were not entitled to the money, she was not going to pay it and the Union was ''a pain in the ass.'' She asked Messercola to write her a letter stating his position on the matter, but he never did so. Acee testified that after receiving Messercola's calls, she did not investigate the matter because Respondent's foreman records the hours worked and he ''is there working with the men.''

On December 11 Springer called Acee and asked her about the hours he had not been paid for up until that day. She told him that she was not paying them for the hours and she did not care what he did. On December 23 he went to Respondent's office to pick up his paycheck and spoke to Acee. He told her that his check was short 4 hours' pay (presumably for December 23). She told him that everybody was paid for only 4 hours that day. He said that he was not there to argue, and he left.

Acee testified: ''Our policy is 2-4 and 8.'' She testified that Springer and Costello were paid the proper amount for the days in question because they were paid for the number of hours set forth on their timecards for the dates in question.

Article III, section 2(d) clearly states that the crane operator and crew are to be paid for 8 hours of work if they report to work and weather is permitting. It also states that it takes precedence over the 2-4-8 provision. Springer and Costello reported for work on the 6 days in question and the weather was permitting on each of these days, yet they were paid only for 4 hours for each of these days. There is no evidence that Respondent bargained with the Union regarding changing article III, section 2(d), or that the Union agreed to any change in this provision. Respondent therefore unilaterally failed and refused to continue in full force and effect article III, section 2(d) of its agreement with the Union. As this is a mandatory subject of bargaining, Respondent has therefore violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on about October 22, 1992, by virtue of a collective-bargaining agreement executed on that day, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All operating engineers, firemen, oilers, crane operators, and/or crew employed by Respondent at the Johnstown jobsite.

4. By failing and refusing to pay 8 hours' pay to Thomas Springer and William Costello for October 29, November 6, 11, and 24, and December 17 and 23, as required by article III, section 2(d) of its collective-bargaining agreement with the Union, without prior negotiations with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent restore Springer and Costello to the position they would have been absent the violation herein, i.e., by paying them for an additional 4 hours at the contractual rate for the 6 days in question, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 427 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Central Steel Erecting Co., Inc., Chadwicks, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to comply with all the terms of its collective-bargaining agreement with the Union executed

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

on October 22, 1992, without first negotiating with the Union about said changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to Thomas Springer and William Costello 4 additional hours of pay for October 29, November 6, 11, and 24, and December 17 and 23, 1992, at the rate of pay as specified in its collective-bargaining agreement with the Union executed on October 22, 1992, with interest.

(b) Post at its office in Chadwicks, New York, and at each of its worksites, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT make unlawful unilateral changes in our employees' wages without first bargaining collectively with International Union of Operating Engineers, Local 106, AFL–CIO (the Union), the collective-bargaining representative of our operating engineers, firemen, oilers, crane operators, and/or crew employed by us at the Fulton County Jail jobsite.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL make whole Thomas Springer and William Costello by paying them for an additional 4 hours at their contractual rate of pay, with interest, for the following days in 1992: October 29, November 6, 11, and 24, and December 17 and 23.

CENTRAL STEEL ERECTING CO., INC.